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NO.

IN THE
SUPREME COURT OF THE UNITED STATES

SURAIYA MATEEN et al
Petitioners,

VS.

FRANK DICUS
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether striking of answers and entering a default judgment in a case where there are no discovery abuses is in violation of fifth, fourteenth and seventh amendments of the Constitution of the United States.

AND

Whether, in a Multi-defendants case, Entry of default judgment against few defendants without determining the liability of all the Co defendants is in violation of the due process, and is in conflict with the opinion of the U.S. Supreme Court in *Frow v. De la Vega*, 82 U.S. (15 Wall.) 552, 21 L. Ed. 60 (1872) and in conflict with the opinion of almost all the Circuit Courts.

PREFACE

The Federal Rule of Civil Procedure, Rule 37 (b) & (d), is invariably applied by the trial courts to enter default judgments without considering lesser sanctions. Further, in multiparty cases, the default judgment is often entered against few defendants without determining the liability of all the defendants.

Petitioners claim that entry of default judgment as a sanction is abuse of discretion of the trial courts:

1 It prevents the case from getting adjudicated on its merits.

2. It violates the Due Process clause of the Fifth, Fourteenth and the Seventh Amendments of the constitution of the United States.

3. In multi-defendant cases it results in "inconsistent judgments" and thus violate "Frow Doctrine."

This petition is a good vehicle for the US Supreme Court to determine the Constitutionality of Federal Rule of Civil Procedure, Rule 37 (b) & (d), so as to avoid abuse of this Rule by the Courts below.

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PARTIES TO THE PETITION

The parties in the Court of Appeals are the Parties here:

Suraiya Mateen
Roohi Faiyaz
Reem Muhammadi
Petitioners

Frank Dicus
Respondent

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797 F.2d 151	Aug 01, 1986	Third
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819 F.2d 806	May 20, 1987	Seventh

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

Petitioners submit the Final Opinion of the Court of Appeals entered on June 27, 2007 for review, *Mateen et al v. Dicus* A05A1372 (Appendix B).

THE OPINIONS BELOW

1. Supreme Court of Georgia's Denial of the Petition for Certiorari to Court of Appeals entered on January 07, 2008, Case No. S07C1814. (Appendix A)

2. The Final Judgment of the Court of Appeals of the State of Georgia entered on June 27, 2007 *Mateen et al v. Dicus , A05A1372* (Appendix B).

3. State Court Orders Denying to set aside the Default judgment (Appendix C).

4. Voluntary Dismissal with Prejudice of a Co defendant (Appendix D).

5. Trial Court Orders limiting time for discovery proceedings. (Appendix E)

6. Notice of scheduling depositions in violation of Court Orders, (Appendix F).

BASIS FOR JURISDICTION IN THIS COURT

The Court of Appeals of the State of Georgia entered its Final Opinion on June 27, 2007.

The Supreme Court of Georgia denied the Petition for Certiorari on January 07, 2008.

The Petition in the United States Supreme Court is being timely filed within ninety days from January 07, 2008.

Pursuant to 28 U. S. C. §1257(a) , the United States Supreme Court possesses jurisdiction to review State-Court determinations by writ of certiorari, where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, or any title, right, privilege, or immunity is specially set up or claimed under the Constitution .

1. FEDERAL CONSTITUTIONAL PROVISIONS

This case involves the Fifth Amendment , the Fourteenth Amendment and the Seventh Amendment of the US Constitution: .....No person be deprived of life, liberty, or property, without due process of law & the right to jury trial should be preserved.

2. STATE CONSTITUTIONAL PROVISIONS

Article I, Section I, Para I , II & XI ...No person shall be deprived of life, liberty, or property except by due process. Right to Jury Trial shall remain inviolate.

3. FFEDERAL STATUTORY PROVISIONS

FRCP , § § Rules 37 (b) 37(d),

FRCP 41(a)&(b), Rule 54 (b)

4. STATE STATUTES

OCGA § § 9-11- 37 (b) & (d), 9-11- 41(a)& (b)

OCGA § § 9-11-54 (b)

STATEMENT OF THE CASE

A large number of well defined class of civil cases exist across the United States in which the Trial Courts routinely either dismiss the cases or enter default judgments against defendants. This practice is prohibiting the cases to get adjudicated on their merits. Consequently, the innocent defendants against whom some frivolous cases are filed get deprived of their constitutional rights to have their day in the Court. Moreover, State Appellate Courts routinely affirm the Lower Court judgments, without giving due consideration to the constitutional rights of the appellants.

Petitioners are the victims of the above stated unconstitutional practice of the Courts. This Petition is an attempt to draw the attention of the United

States Supreme Court towards the abuse of discretion of the lower courts and the resultant violation of the constitutional laws.

This petition seeks review of the Final Opinion of the Court of Appeals of the State of Georgia entered on June 27, 2007. The Court of Appeals have Affirmed the Trial Court's Denial to Set Aside the Default judgment entered erroneously against petitioners.

The United States Supreme Court's intervention is required here as the Court of Appeals has avowedly created a conflict with the well established opinion of this court in *Frow v. De La Vega* and has also created a conflict with almost every Circuit Court.

Appellants have set forth to the court of appeals a prima facie case of respondents contempt , fraud and misrepresentations in the lower courts.

This is a case wherein Respondents filed a frivolous joint complaint of alleged fraudulent transfers of some real estate properties against petitioners and their attorney, John Walrath.

Respondents then failed to complete the discovery proceedings within the extended discovery period as ordered by the trial court and intentionally in bad faith failed to prosecute the case.

Respondents were in contempt of Court Orders entered on November 10, 1998, Record page No. 1186, as they intentionally failed to comply with the court orders regarding discovery proceedings.

Further, record of the case is evident of the fact that respondents neither filed any request nor sought permission with the trial court to extend the discovery time. They simply ignored the Court Orders.

As a matter of law, Pursuant to FRCP 41 (b) and OCGA Section 9-11-41(b) Respondent's case was involuntarily dismissed by Operation of Law.

Although, the case was involuntarily dismissed, but, Petitioners answered all the untimely interrogatories of respondents appeared for all the untimely scheduled depositions.

After complying to all the untimely requests of the respondents, petitioners filed Motions to Dismiss the case and Motions for Summary judgments. Record Page Nos. 2229 - 2346.

A hearing was scheduled, but during the hearing, respondents took advantage of the pro se litigants and misguided the trial court to enter a default judgment against petitioners.

The Trial Court instead of dismissing the case

for respondents contempt of court orders and failure to prosecute, entered a default judgment against petitioners, although the court had no jurisdiction to do so. Pursuant to FRCP 41(b), the case was no more existing in the trial court. But , still the court entered default judgment against petitioners, as a punishment for their inability to pay $ 2000 to respondents.

The erroneously entered default judgment had deprived the petitioners of their right to a jury trial. It was the burden on respondents to prove an allegation of fraudulent transfers in a jury trial.

Subsequent to the default judgment , respondents voluntarily dismissed with prejudice a joint co defendant attorney, John Walrath.

Dismissal of Walrath adjudicated the case on merits. This has resulted in inconsistency with the

default judgment against petitioners. The default judgment against the petitioners was therefore rendered void as a matter of law.

Petitioners therefore filed a Motion in the trial court to set aside the default judgment. The Motion was denied without a hearing. Petitioners filed a notice of appeal. While the notice was pending, the trial court entered a judgment on damages against petitioners.

An appeal was filed for damages as well for the denial to set aside the default judgment. Court of Appeals affirmed the judgment on damages and declined to rule on the Denial to set aside the default judgment.

Petitioners filed a Petition for certiorari in the Supreme Court of Georgia. Supreme Court , totally

Reversed the Court of Appeals remanded the case back to the Court of Appeals to rule on the remaining issues, *Mateen v.Dicus,281 Ga. 455, 457, 637 SE.2d 377(2006)*.

The Court of Appeals entered its final Opinion on June 27, 2007. The Court of Appeals vacated its orders entered on September 8, 2005, and affirmed only two errors: Respondent's addition of a party to the case through Notice of Publication and Trial Court's Denial to set aside the default judgment.

The Court of Appeals affirmation of the denial of the trial court to set aside the default judgment has raised the constitutional issues of due process clause.

The Court of Appeals Opinion below is also in conflict with the Opinion of this court in Frow and in conflict with the opinions of almost every Circuit Court.

Grant of this petition is therefore warranted.

BRIEF HISTORY AND STATEMENT OF FACTS

The history of the case goes back to a business transaction between respondent Dicus and Dicus Ent. and one of the defendants, Faiyaz and Medina Ent.

None of the other defendants including the petitioners were ever a party to that business deal. The business transaction between Dicus and Faiyaz ended in an arbitration . Faiyaz lost the arbitration. Dicus then repossessed his collateral which he had sold to Faiyaz for $ 380, 000 under Uniform Commercial Code R-Page 3807 (Vol. VII). He then sold it to a third party and failed to file for any deficiency claim., *ref* to O.C.G.A.§ 44 -14 - 161 (a)

Respondent was barred from pursuing any further action on his alleged claims. Therefore, as a matter of law, the arbitration award was deemed

satisfied and Dicus was no more a creditor of Faiyaz.

On March 27, 1998, after the repossession of the collateral, out of greed , respondent filed a frivolous complaint of alleged fraudulent transfers against Faiyaz and his whole family (Petitioners). The properties involved were the assets of a Living Trust declared in the year 1992.

His allegation against petitioner Mateen was of conspiracy and against the co defendant attorney, Mr. John Walrath was of conspiracy along with an allegation of preparing the documents of alleged fraudulent transfers.

Defendants had following meritorious defenses to Dicus's frivolous complaint:

1. Properties were the assets of a living trust: The real estate properties against which an alleged

fraudulent transfer action was filed were the assets of a Living Trust, declared by petitioner Mateen in the year 1992 , six years before Faiyaz even entered into any business transaction with Dicus. Living Trust document , R- Page 2252 - 2332 .

2. Dicus no more a creditor : Dicus was no more a creditor of Faiyaz as his arbitration award was satisfied when he repossessed his collateral and sold it. Farmers Bank Union Point v. Hubbard, 247 Ga 431 276 S.E. 2d 622 (1981) Emmons v . Burkett 256 Ga 908 (1987) Borden v. Pope Jeep - Eagle Inc. 200 Ga App.176, 407 S.E. 3d 128, 133 (1991) Business Dev.Corp v. Constable, 261 Ga. 886, 413 S.E 2d 447, 448 (1992), O.C.G.A.§ 44 -14 - 161 (a)

Based on the above citations and rules of law Dicus's complaint against the appellants was abusive ,

frivolous and was only to harass and to usurp the assets of the trust.

Petitioners filed motions to dismiss the frivolous complaint of respondent and submitted briefs and affidavits in support, R- Page 87 - 175.

Respondents knowing very well the meritorious defenses of petitioners, intentionally failed to complete the discovery proceedings within six months time as required by the Uniform Superior Court Rule 5.

Later, On November 6, 1998 , which was the last day of statutory time limit to complete the discovery, respondents filed a Motion to extend discovery time.

On November 10, 1998 , the Trial Court Granted Plaintiff's motion and Ordered that the discovery should be completed within three months from the ruling on Motions scheduled for hearing on

December 21, 1998. R- Page 1186 . Appendix E.

The extended discovery period ended on March 21, 1999. Respondents again intentionally failed to complete the discovery by March 21, 1999, as ordered by the trial court. Record of the case is evident of the fact that respondents did not file any further requests for the extension of the discovery period after the expiration of the date as ordered by the court.

Pursuant to FRCP 41(b) and OCGA § 9-11-41(b), the case was involuntarily dismissed by operation of law due to respondents' contempt of Court Orders.

On May 25, 1999, while the petitioners were out of the country on vacation, and the case was already dismissed , respondents knowingly and intentionally misguided the trial court by scheduling a Rule Nisi

hearing R- Page 1238 . They fraudulently presented an issue of sanctions which was already presented in the trial court on December 21, 1998 and was adjudicated in favor of petitioners.

Further, the notice of Rule Nisi hearing was intentionally not served upon the petitioners' attorney, Mr. Robert McDonnell, who was representing them at that time. The attorney therefore failed to be present at the hearing. The Court granted sanctions of $ 2000 in absence of petitioners and their attorney. Petitioners' attorney later filed a Motion to set aside the Orders of sanctions and submitted an affidavit in this regard, R- Page No. 1269 - 1272. The Court denied the Motion without a hearing.

After returning from vacation, petitioners came to know about the sanctions, they were not in a

position to pay $ 2000 . They therefore filed a joint motion requesting the Court to allow them some time to pay $ 2000 towards attorney fee as ordered by the court, R Page 2282 - 2283. But, as usual, appellees again misguided the Trial Court to impose this unusual harsh sanction to strike off the answers of appellants for not paying $ 2000 on time.

Pursuant to OCGA Section 9-11-37(d) and FRCP 37(d), the Courts have discretion to strike the answers of parties who fail to appear for depositions and not as a sanction for delay in payment of attorney fee.

As evident from the record of the case, there has been no discovery abuses on part of petitioners.

All the defendants timely answered the interrogatories which were submitted in May, 1999.

Respondents scheduled depositions six months

after the expiration of the discovery period . They intentionally ignored the court orders to complete discovery by march 21, 1999 and scheduled depositions for the first time on September 9, 1999, Appendix F.

Petitioners subjected themselves to all the untimely scheduled depositions . The depositions are docketed on August 16,2000.

The depositions are on record on the following pages:

Deposition of Suraiya Mateen R-Page 1492 - 1653

Deposition of Roohi Faiyaz R- Page 1654 - 1794

Deposition of Reema Faiyaz R- Page 1795 - 1960

Deposition of Mohd Faiyaz R- Page 1961 - 2126

Amazingly, on February 12, 2001 although all the depositions and interrogatories were in front of the Trial Court , still the Trial Court entered a default judgment against petitioners , R .P. Nos 2621 - 2627

Upon misguidance of respondents, the trial court has misapplied OCGA §, 9-11-37(d) which is incorporated as FRCP Rule, 37 (d) and has stricken off the meritorious answers of petitioners and entered a default judgment against them.

The language of the FRCP Rule 37(d) is as follows:

The court where the action is pending may, on motion, order sanctions if :

(i) A party or a party's officer, director, or managing agent — or a person designated under Rule 30(b)(6) or 31(a)(4) — fails, after being served with proper notice, to appear for that person's deposition; or

(ii) A party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

Thus, the question arises whether the petitioners failed to appear for their depositions as contemplated in Rule 37(d)? OR Did they fail to submit their interrogatories ?

The record of the case shows that petitioners did appear for their depositions . Docket of the case, Page Nos. 1492 - 2126 is evident of the fact that petitioners did appeared for all their untimely scheduled depositions and submitted answers to all the interrogatories on time. Thus, it an ERROR of the trial court to enter a default judgment against petitioners for the following reasons:

1. Violation of Constitutional laws: Entry of a default judgment without considering the lesser sanctions is the violation of the Fifth, fourteenth and seventh amendments of the Constitution of

the united States. Particularly, when there are no discovery abuses.

2. Conflict with Frow Doctrine : In a Multiparty case, entry of default judgment against few defendants prior to the determination of the liability of all the defendants is unconstitutional and is in conflict with the decision of the US Supreme court in *Frow v. De L Vega* and also in conflict with numerous appellate decisions,

Subsequent to the default judgment, respondents voluntarily dismissed the co defendant , Attorney John Walrath.

John Walrath was vital to the case as a joint co defendant ever since March 27, 1998. Respondents failed to prosecute the case for five years. On March 5, 2003 co defendant John Walrath filed a Motion for

Summary judgment and requested for an oral argument. (R-P.Nos. 3038 - 3061). A hearing was scheduled for September 13, 2003.

On September 8, 2003 respondents voluntarily dismissed with prejudice attorney, John Walrath, R- Page 3594-3595.

As a matter of law, Voluntary dismissal of the case with prejudice against co defendant John Walrath is the final adjudication of the case on merits, R-P.Nos. 3594 - 3595. Consequently, the default judgment against petitioners was rendered void.

Grant v. Franklin, 244 Ga. App. 370, 371 (534 SE2d 584) (2000);

Kent v. State Farm &c. Ins. Co., 233 Ga. App. 564, 566 (2) (504 SE2d 710) (1998).

Crolley v. Dergara, 248 Ga. App. 423 A00A2424.

In view of the co defendant , John Walrath's

dismissal of allegations on merits, Petitioners filed a Motion to set aside the fraudulently obtained default judgment. Respondents failed to file a response. But, still on November 6, 2003,the Court denied petitioners' Motion without a hearing. R- Page 3737- 3738.

On November 17, 2003, petitioners filed a Notice of discretionary appeal for the denial of the trial court to set aside the default judgment.

On November 26,2003 , while the petitioners appeal was pending R- Page 3765 - 3769 , the trial court entered a judgment on damages against petitioners without a jury. Petitioners appealed the judgment n damages along with all the interlocutory judgments in the Court of Appeals.

On September 8, 2005 , the Court of Appeals affirmed the trial Court's Final judgment on damages.

Petitioner filed a Certiorari for Court of Appeals in the Supreme Court of Georgia. The Certiorari was Granted.

On October 30, 2006 , the Supreme Court of Georgia Reversed the Court of Appeals affirmation of the Trial Court's judgment on damages and remanded the case with directions to review the remaining errors of trial court which the Court of appeals declined to review in its opinion entered on September 8, 2005.

On June 27, 2007, the Court of Appeals vacated Sept 8, 2005 orders in total, and affirmed only two of the Trial Court Orders which it declined to review earlier.

Entry of the default judgment and then Denial to set it aside has raised issues of National Importance. Conflict of the FRCP Rule 37 (b) & (d) with the due process laws of the constitution warrant intervention of

the Supreme Court and hence Grant of this petition.

REASONS FOR GRANTING THE PETITION

I. Petitioners have Presented questions of National Importance

This Petition should be granted as the petitioners have presented to the Honorable Supreme Court, "Questions" that are of great National importance. Review of this petition will help to resolve the existing conflicts between the Federal Rules of civil procedures Rule 37 (b)&(d) and the constitutional laws.

It has long been recognized that the fifth , fourteenth and the Seventh amendments of the Constitution of the United States guarantee the Constitutional rights of all the citizens of the United States. *See* Shaughness v. Mezei, 345 U.S. 206,212 (1953); Wong Wing v. united States, 163 U.. 228, 238

(1896) ; Yick Wo v. Hopkin, 118 U.S 356, 369 (1886).

This case is an excellent vehicle for the United States Supreme Court to resolve the issue of violation of the due process clause of the fifth, Fourteenth and the seventh Amendments of the constitution which occurs involuntarily when the Trial Courts exercise their discretion and apply FRCP Rule, 37(b)&(d) to enter default judgments.

After the entry of the default judgment, the only hope left for the adverse party is to "Appeal". A large segment of population as well as the judiciary system is significantly affected by this practice.

The recent decision of the Supreme Court *In Cooper* has technically declared its superiority to state officials in interpreting the Constitution laws. Now, when it comes to the meaning of the Constitution, the

Justices of the Supreme Court are not only the final authority in the temporal sense of having the final say, but also as the only authority in an absolute sense.

The Supreme Court have powers to enforce the provisions of the constitutional Laws . Simultaneously, the Supreme Court have powers to supervise the improper application of the federal rules of civil procedures .

The Supreme Court has to review the Trial Court's denial to set aside a void default judgment and the Court of Appeals affirmation of the Denial.

Therefore, in order to restore the integrity of the constitutional laws, and to put limitations on the discretion of the trial courts, it is mandatory for the Supreme Court to Grant this Petition

II. THE DECISION BELOW CONFLICTS WITH RELEVANT DECISIONS OF NUMEROUS HIGHEST STATE COURTS AND THE UNITED STATES SUPREME COURT

The Court of Appeals has affirmed the Trial Courts Denial of Petitioners Motion to set aside the default judgment. On Page 4 - 5 of its opinion the Court of Appeals has stated:

" Appellants contention that a voluntary dismissal with prejudice of an alleged joint tortfeasor renders void the judgment against the remaining defendants is not supported by Georgia Law....."

As the Opinion of the Court of Appeals here drastically departs from the mainstream of American jurisprudence and from the Federal and State constitutional laws, it warrants review.

1. The Court of Appeals opinion is in conflict with

the well established opinion of the United States Supreme Court in *Frow v. De la Vega,* 82 U.S. (15 Wall.) 552, 21 L. Ed. 60 (1872).

2. The Court of Appeals is in conflict with nearly all the decisions of every circuit court in this context .

The State of Georgia's Rules of Civil Procedure and the Constitutional laws of Georgia are framed in accordance with the Federal Rules of Civil Procedure and the Federal Constitutional laws.

In the instant case , the Court of Appeals was bounded to reverse the trial court orders denying to set aside the default judgment in view of the FRCP 54 (b) and also in view of the well established opinion of the United States Supreme Court in *Frow v. De La Vega*, 82 U.S. (15 Wall.) 552, 21 L. Ed. 60 (1872).

The above case, well known as "Frow Doctrine" is applied by almost all the Appellate Courts of the United States wherein multiple defendants are jointly involved.

Petitioners have raised the necessity of applying Frow doctrine in their opening brief filed in the Court of Appeals. But, the court of Appeals overlooked, and consequently, the opinion entered below is in conflict with the opinion of the United States Supreme Court and also in conflict with the opinion of almost every Appellate court of the United States.

To maintain the harmony of judicial system , the Supreme Court has to Grant this petition so as to review the following:

1. APPLICATION OF FRCP 37 (b)&(d) VOILATES THE CONSTITUTIONAL LAWS

Numerous highest courts of different states are of opinion that striking of answers and entry of default judgments is a harsh sanction, as it prohibits the case from proceeding on its merits. Consequently, deprives the victimized parties of their constitutional rights of Due Process.

Pursuant to OCGA Section 9-11-37(d) and FRCP 37(d), the Courts can strike the answers and enter default judgment for parties who fail to appear for depositions and not as a punishment for failure to pay Monetary sanction.

No matter , whatever is the reason for striking the answers and entry of default judgments , the aggrieved parties are invariably deprived of their

fundamental right of due process and the constitutional laws are involuntarily violated.

In order to harmonize the Federal Rules of Civil Procedure and the Constitutional rights of the public, the trial court's discretion to enter default judgments should be curtailed.

It is the constitutional responsibility of the trial court judges to maintain the integrity of the constitutional laws and make use of their discretion in a way that does not deprive any person of their life , liberty or property without due process of law.

Almost every Appellate court have disfavored entry of the default judgment. Following is the list of cases which are in Conflict with the opinion below. *Newland v. Superior Court* (1995), 40 Cal.App.4th 608, *Hurtado v. Western Med.Ctr.*(1990), 222 Cal.App.3d

1198, 1204

Midwife v. Bernal (1988), 203 Cal.App.3d 57,6

Jones v. Otero (1984), 156 Cal.App.3d at p.754

Twentieth Century Ins.Co v. Tak Hung Choong (2000), 79 Cal.App.4th 1274 [Monetary sanctions pursuant to C.C.P. §177.5 imposed but not paid; trial court imposed additional monetary sanctions and propriety of 2d award was sole issue on appeal;]

"As a general rule, the trial court should attempt to compel compliance with its orders through the imposition of lesser sanctions than dismissal." (Citation omitted.) *Joel v. Duet Holdings*, 181 Ga. App. at 707. *Joel v. Duet Holdings*, 181 Ga. App. 705, 707 (353 SE2d 548) (1987). caused by the failure to respond. OCGA § 9-11-37 (b) (2).

The drastic sanctions of dismissal and default

may be imposed only "in the most flagrant cases — where the failure is willful, in bad faith or in conscious disregard of an order."

In the alternative, the Court could have increased the amount of the sanctions imposed or add some interest to the original amount, but should not have deprived the Petitioners from their inherent right of presenting their meritorious case to the Court and should not have deprived the Petitioners and her family of their properties without a due process.

Whether state action against an individual was a deprivation of life, liberty or property is initially resolved by determining the rights of the individual. Process was due if rights were involved.

'[D]efault judgment is a drastic sanction that should bc invoked only in extreme situations.

Whenever possible, cases should be decided on their merits, for default judgment is not favored in the law.' " Ryles v. First Oglethorpe Co., 213 Ga. App. 327, 328 (1) (444 SE2d 578) (1994)".

It is true that the trial court has a discretion in whether the sanctions of dismissal or default should be entered under Code Ann. 81A-137 (d). Hohlstein v. White, 117 Ga. App. 207 (1) (160 SE2d 232); Williamson v. Lunsford, 119 Ga. App. 240 (1) (166 SE2d 622). However, the lesser harsh sanctions should be considered first. In considering another subsection of the Rule, the Georgia Supreme Court has recognized the desirability of choosing the less harsh measure when circumstances warrant stating that "Justice is the object of all judicial investigations." Milholland v. Oglesby, 223 Ga. 230 (154 SE2d 194). Mullinax, 122

Ga. App. 833 (178 SE2d 909) [(1970)]. The Supreme Court has cautioned against the harsh application of this rule. Millholland v. Oglesby, 223 Ga. 230 (154 SE2d 194) [(1967)].

In , Sumitomo Copper Litigation, 204 F.R.D. 58, 60 (S.D.N.Y. 2001) ("A number of factors may be considered when deciding whether discovery abuse warrants the entry of a default judgment against the transgressor. Among those factors are: '(a) willfulness or bad faith of the noncompliant party; (b) the history, if any, of noncompliance; (c) the effectiveness of lesser sanctions; (d) whether the noncompliant party had been warned about the possibility of sanctions; (e) the complicity; and (f) prejudice to the moving party.' . . . *Sadler v. Dimensions Health Corp.*, 178 F.R.D. 56, 59 (D. Md. 1998) (discussing dismissal or default as

sanction for violations of 37(b) and (d), and stating "a court seeking to impose dismissal as a discovery sanction under Rule 37 must inquire into: (1) whether the noncomplying party acted in bad faith; (2) the amount of prejudice the noncompliance has caused the adversary, which necessarily includes an inquiry into the materiality of the evidence the party failed to produce; (3) the need for deterring the particular type of noncompliance; and (4) the effectiveness of less drastic sanctions." (citations omitted)). *Cf. In re Rossmiller*, 140 B.R. 1000, 1003-04 (D. Col. 1992) (discussing Rule 37(d) in context of failure to respond to interrogatories or requests for production and commenting that "[a] default judgment is a harsh sanction that will be imposed only when the failure to comply with discovery demands is the result of

"'wilfulness, bad faith, or [some] fault of petitioner' rather than inability to comply," and further stating that "[i]n making findings on the issue of fault, a court should consider . . . (1) the degree of actual prejudice to [the] other party; (2) the amount of interference with the judicial process; and (3) the culpability of the litigant. Finally, the cases teach that a court should not enter a default judgment without first considering if lesser sanctions would be effective." (internal citations omitted)); *Mutual Fed. Sav. & Loan Ass'n v. Richards & Assoc.*, 872 F.2d 88, 92 (4th Cir. 1989)

In the instant case, the properties involved were the assets of a living trust . Petitioners are the beneficiaries. The properties worth more than a million dollars. At the time when they came to know about $ 2000 sanctions Petitioners were undergoing severe

financial crises. They therefore requested the Trial court to allow some time for payment of $ 2000 to respondents. The Trial Court instead of considering their motion , exercised its discretion to strike the answers and enter a default judgment against petitioners.

Petitioners were thus deprived of their fundamental civil rights of a jury trial and lost their properties worth more than a million dollars for the sake of $ 2000.

In order to protect the constitutional rights of Jury trial of the petitioners, it was mandatory for the Trial Court to consider lesser sanctions than striking the answers and entry of a default judgment.

Petitioners pray for the equal protection of laws and restoration of the constitution.

2. OPINION BELOW IN CONFLICT WITH THE ESTABLISHED OPINION OF THE US SUPREME COURT

"FROW DOCTRINE"

The principal issue in the instant Petition is, whether the court of Appeals Erred in not applying the well established "Frow doctrine", which is inculcated in the opinion of the U.S. Supreme Court in *Frow v. De La Vega*, 82 U.S. (15 Wall.) 552, 21 L. Ed. 60 (1872).

In cases where Multiple Defendants are involved with joint liability , this doctrine is strongly applied by numerous courts. If multiple defendants are jointly involved, and a default judgment is entered against few, without determining the liability of all the defendants, *Frow* becomes the leading case on the subject of the invalidity of default judgment in such actions.

In Frow v. De La Vega, 82 U.S. (15 Wall.) 552, 21 L. Ed. 60 (1872), the United States Supreme Court has declared: "In a default judgment situation when a plaintiff has alleged joint liability, a default judgment should not be entered against the defaulting defendant if one or more of the defendants do not default." *Id.* at 650, 473 S.E.2d at 661. Under this principle, the entry of default serves to cut off the defaulting defendant's right to participate in the trial on the merits of the other defendants. In effect, the defaulting defendant is locked out, and a final judgment against him must await the outcome or judgment of the remaining defendants. *Id.*

Moore v. Sullivan, 123 N.C. App. 647, 473 S.E.2d 659 (1996)".

In Frow, De La Vega filed suit against Frow and 13

other defendants, alleging that 8 of the defendants, including Frow, fraudulently obtained a tract of land by various devices, including the use of a forged power of attorney. All defendants except Frow filed timely answers. On application of De La Vega, the district court entered the equivalent of a default judgment against Frow in which it determined that De La Vega had title to the land and awarded injunctive relief. The case was then tried and resolved in favor of the answering defendants, resulting in its dismissal. In his appeal, Frow contended that the court erred in entering judgment against him while the case was still pending on the merits as to the answering defendants.

The United States Supreme Court reversed the judgment against Frow, holding:

"If the court in such a case as this can lawfully make a

final decree against one defendant separately, on the merits, while the cause was proceeding undetermined against the others, then this absurdity might follow: there might be one decree of the court sustaining the charge of joint fraud committed by the defendants; and another decree disaffirming the said charge, and declaring it to be entirely unfounded, and dismissing the complainant's bill. And such an incongruity, it seems, did actually occur in this case. Such a state of things is unseemly and absurd, as well as unauthorized by law.

The true mode of proceeding where a bill makes a joint charge against several defendants, and one of them makes default, is simply to enter a default and a formal decree pro confesso against him, and proceed with the cause upon the answers of the other

defendants. The defaulting defendant has merely lost his standing in court. He will not be entitled to service of notices in the cause, nor to appear in it in any way. He can adduce no evidence, he cannot be heard at the final hearing.

But, if the suit should be decided against the complainant on the merits, the bill will be dismissed as to all the defendants alike the defaulter as well as the others. If it be decided in the complainant's favor, he will then be entitled to a final decree against all. But a final decree on the merits against the defaulting defendant alone, pending the continuance of the cause, would be incongruous and illegal. 82 U.S. at 554.

Frow establishes a general rule that "when one of several defendants who is alleged to be jointly liable defaults, judgment should not be entered against that

defendant until the matter has been adjudicated with regard to all defendants, or all defendants have defaulted." 10A Charles A. Wright et al., Federal Practice and Procedure: Civil § 2690 at 73 (3d ed. 1998).

Wright further states that the Frow doctrine also applies where liability is joint and several and even "probably can be extended to situations in which several defendants have closely related defenses." Id. at 76. Several courts have applied Frow in accordance with this approach. See, Farzetta v. Turner & Newall, Ltd., (holding that Frow stands for proposition that if facts are proved at trial which exonerate few defendants and that as matter of logic preclude liability of defaulting defendant, plaintiff cannot obtain judgment against defaulting defendant, even though

defaulter failed to participate in proceeding in which exculpatory facts were proved); Gulf Coast Fans v. Midwest Elec. Importers, 740 F.2d 1499 (11th Cir. 1984) (noting that when defendants are similarly situated, though not jointly liable, judgment should not be entered against defaulting defendant if other defendant prevails on merits);

Federal Deposit Ins. Corp. v. Manatt, 723 F. Supp. 99 (E.D. Ark. 1989) (stating that when defendants are sued jointly and severally and one defaults, judgment should not be entered against defaulter until matter has been adjudicated as to all defendants); Warrington U.S.A., Inc. v. Allen, 631 F. Supp. 1456 (E.D. Wis. 1986)

Days Inns Acquisition Corp. v. Hutchinson, 707 So. 2d 747 (Fla. Dist. App. 1997) (recognizing that

where relief against one defendant is completely dependent upon liability of co-defendant, it is improper to enter default judgment until liability of co-defendant is decided). This approach is summarized in In re Uranium Antitrust Litigation, 617 F.2d at 1257-58:

Frow involved a claim of a joint tort to defraud the plaintiff of title to a res. To the extent that it holds that there cannot be inconsistent adjudications as to joint liability or as to a single res in controversy this ancient equity case remains good law. The result in Frow was clearly mandated by the Court's desire to avoid logically inconsistent adjudications as to liability.

In multiple defendant situations, the long settled rule is that default judgment must be consistent with judgments on merits against other parties. 10 Moor's Federal Practice Section 55.25; 10A Wright & Miller

Section 2690.

Thus , it is an abuse of discretion to enter default judgments that are inconsistent with decisions as to other defendants. Nielson v. Chang (In re First T.D. & Inv., Inc.),253 F.3d 520, 532 (9th Cir. 2001). Such inconsistencies are regarded as "unseemly and absurd." 10A Moor's Federal Practice tion 55.25, quoting Frow v. De La Vega , 82 U.S. 552, 554 (1872); accord 10A Federal Practice and Procedure Section 2690 (quoting Frow).

The Ninth Circuit in its recent invocation of the Frow principle in a Bankruptcy appeal has stated " it is incongruous and unfair for a court to enter a default judgment inconsistent with the merits decision regarding another defendant. First T. D & Inv., Inc., 253 F. 3d at 532 - 33 holds that pursuant to Fed. R.

civ. P. 54 (b) a court violate the Frow principle and abuse its discretion by entering a default judgment. There is also a due process issue embedded in the facts, Jones v. Flowers, 126 S.C t. 1708 (2006).

THE SUPREME COURT OF NEBRASKA

In State Department of Insurance v.Countrywide Truck Insurance Agency, Inc.,258 Neb. 113 (Neb). Following decision entered on Nov. 12, 1999

Default Judgments. A trial court should defer entering a default judgment against one of multiple defendants where doing so could result in inconsistent and illogical judgments following determination on the merits as to the defendants not in default.

Nebraska Court reported two cases in which a default judgment was entered against one of several defendants:

1 In Grant v. Clarke, 58 Neb. 72, 78 N.W. 364 (1899), the plaintiff brought an action against multiple defendants to foreclose a mortgage securing two promissory notes. The court entered a default judgment against one of the defendants and, after trial, resolved the action against the other defendants. On appeal, this court found that there was no proof establishing the plaintiff's title to the notes and his right to foreclose the mortgage securing them, and thus reversed the order of the district court. However, without mentioning Frow v. De La Vega, 82 U.S. (15 Wall.) 552, 21 L. Ed. 60 (1872).

2. A similar relationship between defendants was alleged in Nichiro Gyogyo Kaisha v. Norman, 606 P.2d 401, 404 (Alaska 1980), where the plaintiff alleged that two corporations "acted as a single corporate entity in

regard to the significant facts set forth in the amended complaint and are in essence the alter egos of each other." One of the corporations answered, but the other defaulted, and the plaintiff obtained a default judgment. Characterizing the claim as one alleging joint liability and citing the Frow doctrine, the court held that the default judgment was improperly entered because the defendant had not had an opportunity to defend on the merits.

Similar allegations were considered in In re Vantage Petroleum Corp., 43 B.R. 257 (Bankr. E.D.N.Y. 1984), where bankruptcy trustees alleged that debtors and other defendants fraudulently transferred assets to a corporate entity alleged to be the transferors. In determining that the Frow doctrine precluded entry of a default judgment against the

transferee corporation where other defendants were not in default, the court reasoned that where several defendants are charged with transferring funds to one of the defendants, all of the defendants might be found liable, or fewer than all of the defendants might be found liable; but never would only a transferor or only a transferee or only any third co defendant with same allegations be found liable.

Such a situation, however, becomes a possibility upon the entry of a default judgment solely against [the transferee]. Although all of the alleged transferors might be exonerated, the transferee would nevertheless be held liable. A finding of liability as to the transferee but no liability as to all transferors would certainly be inconsistent and unjust. Id. at 260.

As we interpret Frow v. De La Vega, 82 U.S. (15 Wall.)

552, 21 L. Ed. 60 (1872), a trial court should defer entering a default judgment against one of multiple defendants where doing so could result in inconsistent and illogical judgments following determination on the merits as to the defendants not in default. Under the fraudulent transfer theories asserted by Florida, a trial on the merits could only result in the liability of both Truck and Agency or the liability of neither. However, the entry of default judgment against Truck could lead to the illogical and inconsistent result that Truck, the alleged fraudulent transferor, would be liable, whereas Agency, the alleged fraudulent transferee, would not. Furthermore, in asserting its alternative theories of recovery, Florida alleges joint and collective action on the part of the defendants, as opposed to independent acts on the part of each named defendant. It alleges

that "defendants have converted plaintiff's trust funds to their own benefit," that "defendants have failed and refused to turn over" premiums collected, and that the "transfer of the Truck business and assets and/or USAC premium to other entities constitutes unlawful distributions for the benefit of defendants in violation of their fiduciary obligations to USAC and plaintiff." In light of these allegations of fraudulent transfer, and collective action, we construe the operative petition, taken as a whole, as alleging that the three named defendants are jointly liable as a single entity.

Because the default judgment against Truck and a judgment on the merits in favor of Agency and Fulkerson would be logically inconsistent and prejudicial to the interests of Agency and Fulkerson, we conclude that the Frow doctrine is applicable in this

case involving, inter alia, allegations of joint liability, and that Agency and Fulkerson have sufficient stakes in the outcome of the controversy to afford them standing to appeal from the default judgment against Truck. See, Hussey, Gay & Bell v. Georgia Ports Authority, 204 Ga. App. 504, 420 S.E.2d 50 (1992); C. W. Matthews Contracting Company, Inc. v. Studard, 201 Ga. App. 741, 412 S.E.2d 539 (1991).

For these reasons, we conclude that the district court abused its discretion in denying the motion to stay entry of a default judgment against Truck pending resolution of the claims against Agency and Fulkerson and in entering the default judgment against Truck. The district court should have deferred any entry of judgment until after the claims against Agency and Fulkerson were adjudicated.

For the reasons stated, we conclude that the district court abused its discretion in entering a default judgment. The judgment is therefore reversed and vacated, and the cause is remanded for further proceedings consistent with this opinion.

Amazingly, the decision of the Court of Appeals of Georgia in the instant case is also in conflict with its own decision in Oculus Corporatio v. Fred Chenoweth Equipment Company, 172 Ga App. 547, 323 SE2d 836 (1984) . The Court has stated:

"The trial court erred, however, in entering a final judgment against Oculus based on the default. In Stasco Mechanical Contractors v. Williamson, 157 Ga. App. 545, 546 (278 SE2d 127) (1981), this court held: " 'If . . . the alleged liability is joint a default judgment should not be entered against a defaulting defendant

until all of the defendants have defaulted; or if one or more do not default then, as a general proposition, entry of judgment should await an adjudication as to the liability of the non-defaulting defendant(s). If joint liability is decided against the defending party and in favor of the plaintiff, plaintiff is then entitled to a judgment against all of the defendants -- both the defaulting and non-defaulting defendants. If joint liability is decided against the plaintiff on the merits or that he has no present right of recovery, as distinguished from an adjudication for the non-defaulting defendant on a defense personal to him, the complaint should be dismissed as to all of the defendants -- both the defaulting and the non-defaulting defendants.' 6 Moore's Federal Practice 55.06, at 55-81 (2d ed. 1976); 10 Wright & Miller,

Federal Practice and Procedure: Civil 2690 (1973); Wall v. Benningfield, 237 Ga. 173 (227 SE2d 13) (1976)."

Generally speaking, the alleged liability of the defendants in a particular case is joint unless there is some rational basis for apportioning the alleged damages among them. See Gilson v. Mitchell, 131 Ga. App. 321 (205 SE2d 421) (1974), aff'd Mitchell v. Gilson, 233 Ga. 453 (211 SE2d 744) (1975); Ga. Farm Bldgs., Inc. v. Willard, 170 Ga. App. 327, 331 (317 SE2d 229) (1984). In the present case, there clearly is no basis for such an apportionment. Rather, the liability of the non-defaulting defendants on their bond is totally dependent on, among other things, the validity of Chenoweth's underlying claim against Oculus, which Chenoweth will be required to prove in

order to recover on the bond. See generally Jackson's Mill & Lumber Co. v. Holliday, 108 Ga. App. 663 (4) (134 SE2d 563) (1963).

A judgment in favor of the non-defaulting defendants based on a failure to prove the validity of the underlying claim against Oculus would require the entry of judgment in favor of all the defendants, including Oculus, that portion of the court's order directing entry of final judgment against Oculus is hereby reversed.

Farzetta v. Turner & Newall, Ltd. (C.A.3, 1986), 797 F.2d 151, 154 (stating that *Frow* stands for the proposition that if facts are proved that exonerate certain defendants, then as a matter of the liability of co defendants against whom a default judgment was obtained is also exonerated, and the plaintiff is

precluded from proceeding any further in the case. In *Internatl. Controls Corp. v. Vesco* (C.A.2, 1976), 535 F.2d 742, 746, fn. 4, the court questioned the continued validity of *Frow* in light of the passage of the Federal Rules of Civil Procedure, but ultimately concluded that "[i]n any event, at most, *Frow* controls in situations where the liability of one defendant necessarily depends upon the liability of the others .

The Maryland Court of Appeals, that state's highest court, reached the same conclusion in the context of *respondeat superior* in a medical malpractice case.

Curry v. Hillcrest Clinic, Inc. (1995), 337 Md. 412, 653 A.2d 934. On appeal, the appellate court held that the plaintiff was not entitled to a default judgment against the hospital.

The procedure established for multiple defendants by Rule 54(b) is strikingly similar and applicable to Frow's doctrine. It not only applies to situations of joint liability, but to those where the liability is *joint and/or several.* Id. at 944 (emphasis added).

Thus, the Fourth Circuit has concluded that *Frow* applies not only to defendants who are alleged to be jointly liable, but also to those defendants thought to be jointly and/or severally liable, or who are otherwise closely interrelated.

In the instant case, it is a Gross Error of the Court of Appeals to overlook the Frow doctrine and make its ruling which is in direct conflict with the ruling of the Supreme Court.

The Grant of Petition is thus warranted.

REFERENCES FOR FROW DOCTRINE

1. 10 Moore's Federal Practice (3 Ed.1997), Section 55.25;

2. 10 Wright, Miller & Kane, Federal Practice and Procedure (2 Ed.1983), Section 2690;

3. 21 Federal Procedure, Lawyers Edition (1997), Section 51:64,

4. *Black's Law Dictionary* 837 (6th ed. 1990)

FROW DOCTRINE APPLICTION BY THE FOLLOWING FEDERAL CIRCUITS :

CITATION	DATE	CIRCUIT
535 F.2d 742	May 13, 1976	Second
463 F.2d 929	Mar 28, 1972	Second
320 F.2d 90	Jul 18, 1963	Second
320 F.2d 90	Jul 18, 1963	Second
349 F.2d 175	Jul 30, 1965	Second

CITATION	DATE	CIRCUIT
349 F.2d 175	Jul 30, 1965	Second
797 F.2d 151	Aug 01, 1986	Third
4 F.3d 1209	Sep 17, 1993	Third
374 F.2d 942	Mar 06, 1967	Fourth
617 F.2d 1248	Feb 15, 1980	Seventh
827 F.2d 252	Aug 26, 1987	Seventh
819 F.2d 806	May 20, 1987	Seventh
154 F.3d 739	Sep 04, 1998	Seventh
116 F.3d 319	Jun 17, 1997	Eighth
370 F.3d 715	Feb 09, 2004	Eighth
105 F.3d 566	Jan 22, 1997	Tenth
82 F.3d 1503	Apr 29, 1996	Tenth
740 F.2d 1499	Sep 10, 1984	Eleventh
234 F.3d 1232	Dec 07, 2000	Eleventh

FROW DOCTRINE IS STRONGLY APPLICABLE IN THIS CASE FOR THE FOLLOWING REASONS

Frow Doctrine and its applicability was raised by Petitioners in their opening brief filed in the Court of Appeals, *Ref*, Page Nos. 14 - 15. This doctrine is highly applicable in this case for the following reasons:

1. Respondent filed an alleged fraudulent transfer action against Petitioners whole family and their attorney, John Walrath jointly.
2. Allegation against all the defendants was of conspiracy and fraudulent transfers.
3. Allegation against attorney John Walrath was of conspiracy as well as an allegation of preparing the documents transferring the properties that were the subject of the alleged fraudulent transfer action.

4.. All the defendants in this case are similarly situated. with same allegation of fraudulent transfers and thus they have joint liability and are undivided.

5. The relief of all the defendants was completely dependant upon the liability of each other and particularly upon the determination of the liability of the joint co defendant John Walrath, as he was charged with the preparation of the documents.

John Walrath is an experienced professional lawyer who represented defendant Faiyaz in his business litigation with Dicus . Now, when the allegation against John Walrath has been adjudicated on merits , then the default judgment against petitioners cannot stand. The allegations are"undivided" and must therefore be prosecuted in a joint action against them

all. *REF:" Black's Law Dictionary* 837 (6th ed. 1990). Since the liability cannot be divided, the matter should be decided only in like manner as to all defendants. Therefore, if one is liable all are liable. If one defendant prevails on merits, then the default judgment cannot be sustained against other defendants.

Thus, in the instant case, Frow is strongly applicable. It an Error of the Court of Appeals to conclude that the dismissal of the co defendant John Walrath did not render the default judgment against other co defendants void.

Frow stands for the rule that a default judgment should not be entered when the theory of recovery is one of joint Liability. Therefore, when defendant John Walrath is not liable, no other defendant is liable and the default judgment against petitioners is rendered void as a matter of law

THE QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED IN THE COURTS BELOW

The Constitutional and the Statutory issues and the application of Frow Doctrine raised in this Court for review have been raised in the courts below.

REF:

Court of Appeals of Georgia

Opening Brief of Appellants: P. Nos. 13, 14, 15, 18 ,19.

Supreme Court of Georgia

Petition for Certiorari : Page Nos. 6, 9 & 27

CONCLUSION

In view of all the above stated Citations of Authority, striking of answers and entry of default judgment is a harsh sanction which violates the constitutional laws of "Due Process".

The Opinion entered below is in conflict with the well established opinion of the United States Supreme Court in *Frow* and also in conflict with the opinions of almost all the Circuit Courts.

WHEREFORE, Petitioners respectfully request the Honorable Court to Grant this Petition and vacate the opinion of the Court of Appeals of Georgia.

Dated:- 05/17/08

Respectfully submitted,

Suraiya Mateen, Pro se

Roohi Faiyaz Pro se

Reem Muhammedi Pro se

APPENDIX A

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE
ATLANTA

DATE: January 07, 2008
Suraiya A. Mateen
2302 Merrymount Drive
Suwanee, GA 30024

Case No. S07C1814

SURAIYA A. MATEEN et al. v. FRANK DICUS

COURT OF APPEALS CASE NO: A05A1372

The Supreme Court today denied the petition for certiorari in this case.

All the justices concur.

Therese s. Barnes, Clerk

APPENDIX B

FIRST DIVISION
ANDREWS, P.J.,
PHIPPS AND MIKELL, JJ.

Court of Appeals
of the State of Georgia (Seal) June 27, 2007

IN THE COURT OF ALLEALS OF GEORGIA

A05A1372. MATEEN et al. DICUS
MK- 064

MIKELL, Judge,

In Mateen v. Dicus, the Supreme Court reversed Division 1 of our opinion in this case, holding that we erred in concluding that we lack jurisdiction to consider two enumerations of error because appellants Suraiya A. Mateen , Roohi Fatima Faiyaz and Reema

Mohammedi failed to include the relevant orders in their notice of appeal. Accordingly, our prior judgment as to Division 1 is vacated, and the judgment of the Supreme Court is made the judgment of this court. The Supreme Court remanded the case with direction that we consider appellants' remaining enumerations on the merits, We do so below.

1. Appellants complain that the trial court erred in adding a party, defendant Amtul Hameed, through publication. Appellants argue that service by publication was unauthorized because "Plaintiffs were very well aware of the party's address." This argument fails for three reasons. First, Hameed is not a party to this appeal, and appellants have no standing to voice a vicarious objection to the sufficiency of service upon another party.

Second, appellants waived the argument by failing to assert it in the trial court. The record reveals that at a motions hearing, the court asked defendant Mateen, "are you here to argue defendant Hameed's motion for..... insufficiency of service of process? Mateen replied "No". The court stated "Hameed is not [here]. As far as you know, she's in India." Mateen replied "Yes Sir". It is well established that "one cannot complain of a judgment , order, or ruling that his own procedure or conduct procured or aided in causing. Appellants have waived any right to complain of the method of service upon Hameed.

Third, appellee Dicus complied with OCGA § 9-11-4(f)(1)(A) in obtaining the order for service by publication. He submitted as affidavit averring that he believed that Hameed resided in India but that he did

not know where she could be found. Pursuant to the statute, the trial court may grant an order permitting service by publiction if, among other things, the affidavit is proper. In this case , appellants offered no evidence to contradict the affidavit. Thus , the trial court did not err in ordering service by publication upon Hameed.

2. Appellant contend that the trial court erred in refusing to set aside the default judgment entered against them because Dicus's voluntary dismissal with prejudice of defendant John Walrath rendered the default judgment void. Walrath was the attorney who prepared the documents transferring the properties that were the subject of the fraudulent conveyance action. Appellants' contention that a voluntary dismissal with prejudice of an alleged joint tortfeasor

renders void the judgment entered against the remaining defendants is not supported by Georgia law. "A voluntary dismissal with prejudice constitutes a final disposition of the underlying action only as far as the parties involved in the voluntary dismisssal are concerned.... The effect of a voluntary dismissal does not extend to any party not named therein. Furthermore, pursuant to OCGA § 9-11-54(b), an order " which adjudicate fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties," In the case at bar, the dismissal with prejudice adjudicated the liabilities of only one party. It neither terminated the action nor rendered the default judgment void. The Trial Court did not err in refusing to set aside the default judgment.

3. All pending motions filed by appellants are denied.

Judgment affirmed. Andrews, P.J. and Phipps,J.,

concur.

Footnotes:

1. 281 Ga.455(637 SE 2d 377) (2006)
2. Mateen v. Dicus, 275 Ga.App.742,743-744(1) (621 SE2d 487) (2005)

3. 281 Ga at 457. The remainder of our rulings were left undisturbed, and our prior decision is reversed only insofar as it is inconsistent with the Supreme Court's decision.

4. Phillips v. Phillips, 159 Ga. App. 676, 677 (2)(285 SE2d 52) (1981). Accord, Ueal v. AAA Partners in adoption, 269 Ga. App. 258, 260 (2)(603 SE2d 672)(2004)

5. (Citations and punctuations omitted.) Parlato v. City of Atlanta, 151. Ga. App. 235, 237 (259 SE2d 217)(1079).

6. Headquarter v, Merrill Lynch, Pierce, Fenner & Smith, 272 Ga. 209, 211-212(2) (528 SE2d 508) (200) (voluntary dismissal of employee does not bar vicarious liability of employer for employee's tortious acts unless dismissal is statutorily described as an adjudication on

the merits).

7. See Tanaka v. Pecqueur, 28 Ga. App. 380, 383(5) (601 SE2d 830)(2004)

APPENDIX C Record Page Nos: 3737-3738

IN THE SUPERIOR COURT OF GWINNETT COUNTY

STATE OF GEORGIA

FRANK DICUS
Plaintiff

vs.

MOHAMMAD A, Faiyaz
SURAIYA A. MATEEN
ROOHI FATIMA FAIYAZ
REEMA MOHAMMEDI
JOHN G. WALRATH and
AMTUL HAMEED
Defendants

CIVIL ACTION
FILE NO. 98-A-2162-7

ORDER

Defendant Mateen filed her Motion to Set Aside Default Judgment on October 21, 2003. This Court has previously considered this issue, and this defendant presents no new evidence for the Court's consideration.

It is clear from the record that Defendant was present at the February 7, 2001 hearing on Plaintiff's

Motion for Sanctions, based on defendant's non - compliance with the Court's Order imposing sanctions in connection with compelling depositions, which resulted in the striking of Defendants Answer and entry of a Default Judgment against her on February 12, 2001. This Defendant has made the same allegation of fraud prior to and since then in various different fashions. As such, the Motion is HEREBY DENIED.

This case is on the Court's November 10, 2003 Jury Trial calendar for a trial on damages, and all interested parties should be present and prepared to proceed upon being called in by the Court.

SO ORDERED, THIS 5TH of November, 2003.

/Sd/

MELODIE SNELL CONNNER, Judge
Superior Court of Gwinnett County

Cc: Richard Capriola, Esq
Roohi Faiyaz
Reema MuhAMMED
Suraiya Mateen
Muhammed.Faiyaz
Amtul Hameed

APPENDIX D Record Page No. 003594 - 3595

IN THE SUPERIOR COURT OF GWINNETT COUNTY

STATE OF GEORGIA

FRANK DICUS
Plaintiff

vs.

MOHAMMAD A, Faiyaz
SURAIYA A. MATEEN
ROOHI FATIMA FAIYAZ
REEMA MOHAMMEDI
JOHN G. WALRATH and
AMTUL HAMEED
Defendants

CIVIL ACTION
FILE NO. 98-A-2162-7

DISMISSAL WITH PREJUDICE OF DEFENDANT JOHN G. WALRATH

COMES NOW, Frank Dicus, Plaintiff, by and through his counsel of record WEINSTOCK & SCAVO, P. C., hereby dismisses his claims against Defendant John G. Walrath only in the above -styled case. Said dismissal is *with prejudice*.

Respectfully submitted this 8 day of September, 2003

/Sd/

Michael Weinstock
Georgia Bar no. 746454
Richard J. Capriola
Georgia Bar No.108880
Sharon M. Lewonski
Georgia Bar No. 451818
Attorneys for Plaintiff

WEINSTOCK & SCAVO, P.C.
3405 Piedmont Road, Suite 300
Atlanta, Georgia 30305

APPENDIX E Record Page Nos. 001186

IN THE SUPERIOR COURT OF GWINNETT COUNTY

STATE OF GEORGIA

FRANK DICUS
Plaintiff

vs.
MOHAMMAD A, Faiyaz
SURAIYA A. MATEEN
ROOHI FATIMA FAIYAZ
REEMA MOHAMMEDI
JOHN G. WALRATH

Defendants

CIVIL ACTION
FILE NO. 98-A-2162-2

ORDER

Having come before the Court, Plaintiff's Motion to Extend Discovery, and for good cause shown, it is hereby,

ORDERED AND DECREED, that Paintiff's Motion is Granted and that the discovery period in this

case shall be extended up to , and including three months from the date of the Court's order ruling on Motions scheduled for 12-21-98.

SO ORDERED this 10 day of November , 1998

/Sd/

MELODIE SNELL CONNER
Judge, Gwinnett County Supeior Court

Prepared by:

John T. Lueder Esq.
Georgia Bar No.460665
Attorney for Plaintiff
WEINSTOCK & SCAVO, P.C.
3405 Pidmont Rd, NE., Suite 300
Atlanta, Georga 30305
404 231 3999

APPENDIX F

IN THE SUPERIOR COURT OF GWINNETT COUNTY

STATE OF GEORGIA

FRANK DICUS
Plaintiff

vs.

MOHAMMAD A, Faiyaz
SURAIYA A. MATEEN
ROOHI FATIMA FAIYAZ
REEMA MOHAMMEDI
JOHN G. WALRATH

Defendants

CIVIL ACTION
FILE NO. 98-A-2162-2

NOTICE TO TAKE DEPOSITION

TO: Suraiya a. Mateen
c/o Robert Mcdonnell, Esq.
Alexander Professional Bldg.
2014 Beaver Ruin Road
Norcross, Georgia 30071

YOU ARE HEREBY NOTIFIED that on Thursday, September 9, 1999, beginning at 1:00 p.m., the Plaintiff will proceed to take the oral deposition of Defendant

Suraiya A. Mateen, pursuant to O.C.G.A. § 9-11-30, for the purpose of discovery and any and all other puposes allowed under the Georgia Civil practice act. The deposition ill be taken at the law offices f Winstck & Scavo , P.C. , 3405 Piedmont Road, N.E., Atlanta, Geogia, 30305 before a certified court reporter

This 31 day of August, 1999.

____/Sd/_____
Richard J. Capriola
Georgia Bar No: 108880
Attorney for Plaintiff

WEINSTOCK & SCAVO, P.C.
Suite 300
3405 Pidmont Rd, NE.,
Atlanta, Georga 30305
404 231 3999

98

(2)

FILED
JUN 30 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO: 07- 1444

IN THE
SUPREME COURT OF THE UNITED STATES

SURAIYA MATEEN et al
Petitioners

VS

FRANK DICUS
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF GEORGIA

PETITIONERS' SUPPLEMENTAL BRIEF

Suraiya Mateen et al,
Petitioners
2302 Merrymount Dr.
Suwanee, Ga. 30024
PH: 770 338 4215
770 365 5381
SMateen208@aol.com

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10 James W. Moore, Moore's Federal Practice.....4

Shaughness v. Mezei,
345 U.S. 206, 212 (1953); 2

STAUTES

Federal Rule of Civil Procedure 37(b) & (d)

Federal Rule of Civil Procedure 54(b)

OCGA Section 9-11- 54(b).

SUPPLEMENTAL BRIEF OF PETITIONER

INTRODUCTION

On May 21, 2008, Petitioners have submitted their petition. A Response was due by June 20, 2008, but no brief in Opposition has been filed.

The supplemental brief is being filed to show to the Honorable Court that the respondents had nothing to oppose the petition and also to Cite some new cases in support of the petition.

Respondents chose not to file a response because they could not point to the Honorable Supreme Court any misstatement of fact or law in the petition. They could not object or oppose the consideration of the questions presented by the petitioners.

The Central question presented in this Petition is regarding the direct conflict which the

Court of Appeals of Georgia has created with the applicable decision of this Court in *Frow v. De la Vega, 82 U.S. (15 Wall.) 552, 21 L. Ed. 60 (1872)* and also with the decisions of numerous Circuits Courts. Respondents have failed to meet their burden to prove otherwise.

The Second part of the Court of Appeals of Georgia's opinion entered on June 27, 2007, (Page Nos. 4-5,) is the key issue of this petition. The Court of appeals opinion is attached here as Appendix A. The Court of Appeals in this case has departed too far away from the accepted and usual course of judicial proceedings.

At the first instance, the opinion in the case at bar, is in direct conflict with the well established opinion of this court in Frow, (Frow Doctrine).

The Court of Appeal's opinion on Page No. 5 states:

"In the case at bar, the dismissal with prejudice adjudicated the liabilities of only one party. It neither terminated the action nor rendered the default judgment void. The Trail Court did not err in refusing to set aside the default judgment."

This Opinion directly contradicts the Opinion of the Honorable Supreme Court in "Frow":

THE FROW DOCTRINE

In his appeal, Frow contended that the court erred in entering default judgment against him while the case was still pending on the merits as to the other defendants.

The Supreme Court reversed the default judgment against Frow,

Holding:

"If the court in such a case as this can lawfully make a final decree against one defendant separately, on the merits, while the cause was proceeding undetermined against the others, then this absurdity might follow: there might be one

decree of the court sustaining the charge of joint fraud committed by the defendants; and another decree disaffirming the said charge, and declaring it to be entirely unfounded, and dismissing the complainant's bill. And such an incongruity, it seems, did actually occur in this case. Such a state of things is unseemly and absurd, as well as unauthorized by law.

The true mode of proceeding where a bill makes a joint charge against several defendants, and one of them makes default, is simply to enter a default and a formal decree pro confesso against him, and proceed with the cause upon the answers of the other defendants. The defaulting defendant has merely lost his standing in court. He will not be entitled to service of notices in the cause, nor to appear in it in any way. He can adduce no evidence, he cannot be heard at the final hearing. But if the suit should be decided against the complainant on the merits, the bill will be dismissed as to all the defendants alike ;the defaulter as well as the others. If it be decided in the complainant's favor, he will then be entitled to a final decree against all. But a final decree on the merits against the defaulting defendant alone, pending the continuance of the cause, would be incongruous and illegal." 82 U.S. at 554.

Days Inns Acquisition Corp. v. Hutchinson. 707 So 2d 747 (Fla. Dist. App. 1997), recognized that where relief against one defendant is completely dependent upon liability of co defendant, it is

improper to enter default judgment until liability of co defendant is decided.

Frow involved a claim of a joint tort to defraud the plaintiff of title to a res. To the extent that it holds that there cannot be inconsistent adjudication to joint liability or as to a single res in controversy, this ancient case remains good law.

The result in Frow was clearly mandated by the court's desire to avoid logically inconsistent adjudication as to liability.

Several other circuit courts which are cited in the Petition, follow "Frow Doctrine" which stands for the rule that a default judgment should not be entered against one of several defendants when the theory of recovery is one of true joint liability, such that, as a matter of law, no one defendant may be liable unless all defendants are liable, or no one defendant is relieved unless all are relieved.
Ref: *10 James W. Moore, Moore's Federal Practice*

In the case at bar, respondents filed a joint complaint of alleged fraudulent transfers and conspiracy against all defendants. The allegation against defendant attorney Walrath was that he prepared the documents transferring the properties. Therefore, he was alleged to have played a

fundamental role in this alleged transaction. Liability of Walrath was associated with the liability of all the other defendants. All the defendants were dependant on Walrath for their liability. If the case has been adjudicated on merits against Walrath, How can a default judgment against other defendants sustain?

John Walrath filed a Summary judgment Motion (R-P.Nos. 3038 - 3061). A hearing was scheduled for September 13, 2003. On September 8, 2003, respondents voluntarily dismissed Walrath with prejudice. The case was thus adjudicated on merits.

Accordingly, Frow Doctrine Rule should be strictly followed in this case, and the default judgment against other defendants should be reversed.

The above stated rule which is generally accepted by all Courts is in direct conflict with the Court of Appeals of Georgia's following opinion on (Page No.4):

" appellants' contention that a voluntary dismissal with prejudice of an alleged joint tortfeasor renders void the judgment against the remaining defendants is not supported by Georgia Law."

It has to be noted that the Rules of the constitution of Georgia are framed in accordance with the Rules of the Federal Constitution. OCGA section 9-11-54(b) is in accordance with Federal Rule of Civil Procedure, 54(b) which supports the "Frow Doctrine".

As the opinion of the Court of Appeals here, has departed drastically from the mainstream of American jurisprudence , call for an exercise of this

Court's Supervisory Powers is mandatory.

Secondly, it has long been recognized that the Fifth, Fourteenth and the Seventh Amendments of the Constitution of the United States guarantee the Constitutional rights of due process and jury trial for all the citizens of the United States. See Shaughness v. Mezei, 345 U.S. 206, 212 (1953);

Fourteenth Amendment reads as follows:

"All persons born or naturalized in the United States, ...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Seventh Amendment reads as follows:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, ..."

In the case at bar , the dispute involved the real estate properties worth more than a Million dollars. But, the petitioners were deprived of their day in any court.

In order to restore the integrity of the Constitutional laws and to curtail the discretion of the Trial Courts in misapplying Fed. Rule of Civil Procedure, 37(b) & (d), the grant of this petition is essential.

A large number of the citizens of the United States suffer irreparable harm when the Trial Courts abuse their discretion and erroneously enter default judgments against them. Entry of a default judgment is the harshest sanction which results in involuntary violation of the constitutional laws of guaranteed due process clause.

REASONS FOR GRANTING THE PETITION

1. The Petition should be Granted as the Court of Appeals of Georgia's opinion is in direct conflict with the well established opinion of this court in Frow. Fourteenth Amendment to the United States Constitution, provides Equal Protection of the laws, that "No state shall... deny to any person within its jurisdiction the equal protection of law."

2. The Petition should be granted as the Supreme Court is authorized to curtail the discretionary authority of the trial courts in applying Fed. R. of Civ.Pr. 37(b) & (d). This area of law is badly in need of the United States Supreme Court's Supervisory powers.

3. The Petition should be granted, as the Opinion of the Supreme Court in this case will

provide guidance to the Lower Courts to limit their discretionary authority and avoid striking the answers and entry of default judgments. This will substantially protect the Constitutional laws of Due process, (Amendments Fifth, Seventh and Fourteenth), and will decrease the work load of Appellate Courts to a great extent.

4. If this petition is not granted and the lower courts discretionary authority to strike answers and enter default judgments is not curtailed, then the integrity of the constitutional laws of due process will always remain at jeopardy. The public in general will continue to lose their lives, liberty and property without getting a chance to present their case in any court of law.

5. The Grant of this Petition will show to the lower courts that due consideration should be given to the *pro se* litigants so that they are not deprived of their fundamental rights, *ref Castro v. United Sttes, 540 U.S. 375, 382-383.*

6. The Petition should be granted as it remains unopposed. All the facts presented in the petition are deemed accepted by respondents.

CONCLUSION

In view of the above stated facts, Petitioners respectfully request the Honorable Supreme Court to Grant the Petition or summarily Reverse the Court of Appeals of Georgia's Opinion.

Respectfully submitted this 27th day of July, 2008

Suraiya Mateen
Roohi Faiyaz
Reem Muhammedi

APPENDIX A

FIRST DIVISION
ANDREWS,P.J.,
PHIPPS AND MIKELL, JJ.

Court of Appeals
Of the State of Georgia(Seal)
June 27, 2007

IN THE COURT OF APPEALS OF GEORGIA

A05A1372. MATEEN et al. DICUS
MK - 064

MIKELL , Judge,

In Mateen v. Dicus, the Supreme Court reversed Division I of our opinion in this case, holding that we erred in concluding that we lack jurisdiction to consider two enumerations of error because appellants Suraiya A. Mateen, Roohi Fatima Faiyaz and Reema

Mohammedi failed to include the relevant orders in their notice appeal. Accordingly, our prior judgment as to Division I is vacated and the judgment of the Supreme Court is made the judgment of this court. The Supreme Court remanded the case with direction that we consider the appellants' remaining enumerations on the merits. We do so below.

1. Appellant complain that the trial court erred in adding a party, defendant Amtul Hameed, through publication. Appellant argue that service by publication was unauthorized because "Plaintiffs were very well aware of the party's address." This argument fails for three reasons. First, Hameed is not a party to this appeal, and appellants have no standing to voice a vicarious objection to the sufficiency of service upon another party.

Second, appellants waived the argument by failing to assert it in the trial court. The record reveals that at a motion hearing the court asked defendant Mateen, " are you here to argue defendant Hameed's Motion for.....insufficiency of service of process? Mateen replied "No". The Court stated "Hameed is not [here]. As far as you know, she's in India." Mateen replied "Yes Sir". It is well established that "one cannot complain of a judgment, order, or ruling that his own procedure or conduct procured or aided in causing. Appellant's have waived any right to complain of the method of service upon Hameed.

Third, appellee Dicus complied with OCGA Sec. 9- 11-4(f)(1)(A) in obtaining the order for service by publication. He submitted an affidavit averring that he believed that Hameed resided in India but that he did

not know where she could be found. Pursuant to the statute, the trial court may grant an order permitting service by publication if, among other things, the affidavit is proper. In this case, appellants offered no evidence to contradict the affidavit. Thus, the trial court did not err in ordering service by publication upon Hameed.

2. Appellant contend that the trial court erred in refusing to set aside the default judgment entered against them because Dicus's voluntary dismissal with prejudice of defendant John Walrath rendered the default judgment void. Walrath was the attorney who prepared the documents transferring the properties that were the subject of the fraudulent conveyance action. Appellants' contention that a voluntary dismissal with prejudice of an alleged joint tortfeasor

BEST AVAILABLE COPY

renders void the judgment entered against the remaining defendants is not supported by Georgia law. "A voluntary dismissal with prejudice constitutes a final disposition of the underlying action only as far as the parties involved in the voluntary dismissal are concerned.... The effect of a voluntary dismissal does not extend to any party not named therein. Furthermore, pursuant to OCGA sec. 9-11-54(b), an order "which adjudicate fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties." In the case at bar, the dismissal with prejudice adjudicated the liabilities of only one party. It neither terminated the action nor rendered the default judgment void. The Trial Court did not err in refusing to set aside the default judgment.

3. All pending motions filed by appellants are denied.

Judgment affirmed. Andrews, P.J. and Phipps, J., Concur.

Footnotes:

1. 281 Ga. 455(637 SE 2d 377) (2006)
2. Mateen v. Dicus, 275 Ga. App.742, 743 - 744(1) (621 SE2d 487) (2005)
3. 281 Ga at 457. The remainder of our rulings were left undisturbed, and our prior decision is reversed only insofar as it is inconsistent with the Supreme Court's decision.
4. Phillips v. Phillips, 159 Ga. App. 676, 677(2) (285 SE 2d 52) (1981). Accord, Ueal v. AAA Partners in adoption, 269 Ga. App.258, 260 (2)(603 SE2d 672) (2004)
5. (Citations and punctuations omitted.) Parlato v. City of Atlanta, 151. Ga. App. 235, 237 (259 SE2d 217)(1079)
6. Headquarter v. Merrill Lynch, Pierce, Fenner & Smith, 272 Ga.209, 211- 212(2) (528 SE2d508)200 (voluntary dismissal of employee does not bar vicarious liability of employer for employee's tortuous acts unless dismissal is statutorily described as an adjudication on the merits).
7. See Tanaka v. pecqueur, 28 Ga. App. 380, 383(5) (601 SE2d 830)(2004)

NO : 07 - 1444

IN THE
SUPREME COURT OF THE UNITED STATES

SURAIYA MATEEN et al
Petitioners,

VS.

FRANK DICUS
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF GEORGIA

PETITION FOR REHEARING

Suraiya Mateen et al,
Petitioners,
2302 Merrymount Dr.
Suwanee GA. 30024
PH: 770 338 4215
770 365 5381

INTRODUCTION

This is a case wherein the Court of Appeals of Georgia has affirmed the Trial Court's Denial to set aside the Default Judgment entered against petitioners after striking their Answers and their Meritorious Defenses. Thus, there has been violation of the due process clause of the Fourteenth and the Seventh Amendments of the Constitution of the United States.

The Petition for rehearing is supported by the United States Supreme Court's prior decision in ***HOVEY V. ELLIOTT*** , 1767 U.S. 409, 42 L. ed 215, 17 Sup. Ct. Rep. 841.

The United States Supreme Court's attention is hereby drawn towards the above stated citation so as to ensure Rehearing.

The United States Supreme Court, in Hovey v. Elliott has unanimously stated :

"If a party's case has been put out of the Court without due process , then no matter what is the character of his defense, no matter whether he is in contempt or not, a decree against him , depriving him of his fundamental rights is VOID for want of due process. "

Decision of the United States Supreme Court in *Hovey v. Elliott* is the case law which Governs the case at bar.

The Court of Appeals Opinion in this case is in direct conflict with the well established opinion of the US Supreme court and in direct conflict with the opinions of almost all the Circuit Courts.

To provide equal "protection of law", the default judgment should be reversed for further proceedings.

PARTIES TO THE PETITION

The parties in the Court of Appeals are the Parties here:

Suraiya Mateen ,
Roohi Fayaz,
Reem Muhammadi (Petitioners)

Frank Dicus (Respondent)

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PETITION FOR REHEARING
AND
REQUEST FOR SUMMARY DISPOSITION

Pursuant to Rule 44.2, Petitioners respectfully Petition for Rehearing of the Court's Order entered on October 6, 2008 denying Certiorari in this case. Petitioners also respectfully request the Honorable Court for Summary Disposition of this case as the decision of the lower court here, is in direct conflict with the well established opinions of the United States Supreme Court as well as in conflict with the opinions of almost all the Circuit Courts.

BRIEF "RECALL" OF THE CASE

This is a case wherein the Trial Court has Stricken the answers of Petitioners and entered a default judgment against them as a sanction for their inability to timely pay $2000 to Respondent's attorney. The case was then adjudicated on merits against the remaining co defendant, against whom the alleged

allegations were same as the petitioners.

Petitioners filed a Motion in the Trial Court to set aside the erroneously entered default judgment. Motion was denied without a hearing, **Appendix B**.

Petitioners Appealed the Trial Court's "Denial to set aside the default judgment". The Court of Appeals Affirmed the Trial Court Judgment . **Appendix A**.

The Court of Appeals of Georgia's affirmation of the trial court's denial to set aside the default judgment is an Error. The Opinion is in direct conflict with the opinions of almost all the Circuit Courts and with the Opinions of the United States supreme Court in similar situations.

The Court of Appeals affirmation violates the Due Process clause of the Fourteenth Amendment and Seventh Amendment of the Constitution of the United States . The Opinion therefore warrants **Vacation**.

GROUNDS FOR REHEARING

The right to petition for rehearing of an order denying certiorari is not to be deemed an empty formality as though such petitions will as a matter of course be denied.

Petitioners are seeking the Grant of the Petition for Hearing on the Grounds that they are drawing the attention of the Honorable Supreme Court towards a well established prior opinion of the Supreme Court in ***HOVEY V. ELLIOTT*** . This case was not presented by petitioners earlier.

The above case controls the appellate courts in making decisions when the parties are thrown out of the courts without due process.

Grant of Petition for Rehearing is therefore mandatory , so that the Supreme Court can conclude the case at bar in the light of ***HOVEY V. ELLIOTT*** .

Flynn v. United States, 75 S. Ct. 285, 286 (1955).

REASONS FOR THE GRANT OF THE PETITION FOR REHEARING AND SUMMARY DISPOSITION

The Trial Court has Stricken the answers of Petitioners and entered a default judgment against them as a sanction for their inability to timely pay $2000 to Respondent's attorney

The Court of Appeals of Georgia has affirmed the Trial Court Orders denying to set aside the default judgment, Appendix A.

The Opinion of the Court of Appeals in this case is inconsistent with the Prior well established Opinions of the Supreme Court. The following cases are the controlling authority for the decision of Summary Disposition of the case at bar.

1. *HOVEY V. ELLIOTT* , 1767 U.S. 409, 42 L. ed 215, 17 Sup. Ct. Rep. 841. The Supreme Court in this case has unanimously come to conclusion

that a judgment which is entered by striking the answers and testimony of defendants is a nullity and should be vacated.

2. ***FROW V. De La VEGA***, 82 U.S. (15 Wall.) 552, 21 L. Ed. 60 (1872). The Supreme Court here has Unanimously declared that in a case where multiple defendants are jointly involved and if default judgment is entered against few, then the default judgment should be set aside if the case is adjudicated on merits against the remaining defendants.

In accordance with the Supreme Court Rule 44.2, Petitioners have restricted their " Petition for Rehearing" only to *Hovey v. Elliot*, as this case was not presented and was not the basis of her earlier petition.

HOVEY V. ELLIOTT , 1767 U.S. 409, 42 L. ed 215, 17 Sup. Ct. Rep. 841, is a long learned opinion for a unanimous Court reviewing the law under English

and American cases for more than a century, touching the power of Courts to punish the inability of a party to pay money under an order of court.

The united States supreme Court has arrived at the conclusion that a court cannot for this cause strike out an answer and take the bill for confessed;

The United State Supreme Court hold as follows:

" Although the contempt committed by the defendants had been of most flagrant kind, yet it is not in the power of any court to refuse to allow the party to answer or strike his answers from the files, suppress the testimony in his favor and condemn him without consideration thereof and without a hearing on the theory that he has been guilty of a contempt".

The United States supreme Court held such a decree VOID.

SYLLABUS :

It is not within the power of the Supreme Court of the District of Columbia to order the answer of the defendant in a chancery suit pending in that court to be stricken from the files, and a decree to be entered that the bill be taken *pro confesso* against him, simply because he was held to be guilty of contempt in neglecting to pay into court money held by him which was the subject of controversy in the suit, and declined to appear when summoned to do so.

A court possessing plenary power to punish for contempt, limited by statute, has not the right to summon a defendant to answer, and then after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer or strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of a contempt of court.

The judicial history of the law concerning contempt of court in England and in this country reviewed and considered.

MR. JUSTICE WHITE delivered the opinion of the Court. The facts out of which this controversy grows are fully stated in *Hovey v. McDonald,* 109 U. S. 150,

In June, 1877, the complainants obtained an order from the Supreme Court of the District of Columbia , requiring the defendants McDonald and White to "pay over to the registry of the court" the sum of $49,297.50. This order was disobeyed, and thereupon the complainants, in September, 1877, moved Court to strike the answers of defendants. On February 12, 1878, the Supreme Court of the District of Columbia at general term made decree as follows:

"The answer of defendants having been removed from the files for their contempt in refusing to obey the order of court and deposit in the registry the sum of

$49,297.50, it is now ordered, adjudged, and decreed that the bill be taken *pro confesso* against them."

This judgment was Appealed:

The Court of Appeals of New York held that the judgment was not binding as it was rendered in a contempt proceeding after striking out the answer and refusing to consider the testimony filed in the cause. The judgment was beyond the jurisdiction of the court, as the power of courts of the District of Columbia to punish for contempt was restricted by the provisions of section 725 of the Revised Statutes. *Hovey v. Elliott,* 145 N.Y. 126.

From this judgment, error was prosecuted to the Supreme Court upon the theory that the decision of the Court of Appeals of the State of New York denied proper faith and credit to the judgment rendered by the Supreme Court of the District of Columbia.

The United States Supreme Court Affirmed the

judgment of the Court of Appeals of New York and stated:

The Question is, whether a court possessing plenary power to punish for contempt, limited by statute, has the right to summon a defendant to answer, and then, after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer, or strike his answers from the files, suppress the testimony in his favor, and condemn him without consideration thereof, and without a hearing, on the theory that he has been guilty of a contempt of court. The mere statement of this proposition would seem, in reason and conscience, to render imperative a negative answer.

In @ 78 U. S. 267):

"In our judgment, the district court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. As we are

unanimous in this conclusion, our opinion will be confined to that subject. The order, in effect, denied the respondent a hearing.

The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice."

And, quoting with approval this language, in *Windsor v. McVeigh*, 93 U. S. 277, the Court, speaking through Mr. Justice Field, again said (pp. 93 U. S. 277-278):

"A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. At common law, no man should be condemned

without being afforded opportunity to be heard.

Lord Lyndhurst, C.B. at 574, said:

"A party has a right to be heard for the purpose of explaining his conduct; he has a right to call witnesses for the purpose of his own defense.

In *Bonaker v. Evans,* 16 Q.B. 162

The court said (p. 171):

" A man cannot incur the loss of liberty or property for an offense by a judicial proceeding until he has had a fair opportunity of answering the charge against him,

"Qui statuit aliquid parte inaudita altera, acquum licet statuerit, haud acquus fuit."

Treatise on the Constitution (vol. 2, § 1789), speaking of the clause in the Fifth Amendment, where it is declared that no person "shall be deprived of life, liberty, or property without due process of law,"

Can it be doubted that due process of law

signifies a right to be heard in one's defense? If the citizens are not given any opportunity to be heard, would it not be violative of the Constitution?

If this be true, as it undoubtedly is, how can it be said that the judicial department -- the source and fountain of justice itself -- has yet the authority to render lawful that which, if done under express legislative sanction, would be violative of the Constitution. If such power obtains, then the judicial department of the government, sitting to uphold and enforce the Constitution, is the only one possessing a power to disregard it. If such authority exists, then, in consequence of their establishment, to compel obedience to law, and to enforce justice, courts possess the right to inflict the very wrongs which they were created to prevent.

In @ 85 U. S. 368):

"It is a rule as old as the law that no one shall be

personally bound until he has had his day in court, by which is meant until he has been duly cited to appear, *and has been afforded an opportunity to be heard.* "

Another consideration which is in force is that we have a statute passed in 1830 to restrain arbitrary action by courts, Code 1899, Chap.147. State v. Hansford. 43 w. Va. 773, 2S S.E. 79.

"Perhaps no definition is more often quoted than that given by Mr. Daniel Webster in the *Dartmouth College Case*." This definition is approved without dissent everywhere.

"By the law of the land is most clearly intended the general law; a law which hears before it condemns, which proceeds upon inquiry, and renders judgments only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society."

If the court had power to strike the answers which are in defense. and deny the defendants of their right to be heard , then it is like the Court has the powers of taking property of one and giving it to another without hearing or without process of law?

If the power to violate the fundamental constitutional safeguards securing property exists, then, Why should not a court in a criminal proceeding deny to the accused all right to be heard on the theory that he is in contempt, and sentence him to the full penalty of the law without due Process?

No distinction between the two cases can be pointed out. The one would be as flagrant a violation of the rights of the citizen as the other; the one as pointedly as the other would convert the judicial department of the government into an engine of oppression, and would make it destroy great constitutional safeguards.

Whether, in the exercise of its power to punish for a contempt, a court would be justified in refusing to permit one in contempt to avail himself of a right guaranteed by statute and constitution.

The right which was here denied by striking the answers and taking the bill for confessed, because of the contempt, involved an essential element of due process of law. This is a theory which could not be admitted without violating the rudimentary conceptions of the fundamental rights of the citizen.

It is therefore clear that the Supreme Court of the District of Columbia did not possess the power to disregard an answer and throw the case out.

It is said by this Court in *Adams v. Postal Telegraph Cable Co.*, 155 U. S. 689, "[t]he substance, and not the shadow, determines the validity of the exercise of the power."

In Windsor v. McVeigh, 93 U.S. 274, 23 l. ed

914, where an answer has been stricken out, the Court has stated " The liability and right are inseparable. A different result would be a blot upon our jurisprudence and civilization.

A sentence of a court pronounced against a party without hearing him , or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."

In Underwood v. McVeigh, 23 Gratt, 409, of a decree given after an answer was stricken out, the court said:

" It lies at the very foundation of justice, that every person who is to be affected by an adjudication should have the opportunity of being heard in defense, both in repelling the allegation of fact, and upon the matter of Law; and no sentence of any court is entitled to least respect in any other court , or elsewhere, when it has been pronounced without opportunity of defense.

If the parties had no day in Court, it is not the Due Process of Law under Federal as well as under State Constitution. It is condemnation of justice.

If a party's case has been put out of the Court without due process , then no matter what is the character of his defense, no matter whether he is in contempt or not, a final decree against him , involving his most important fundamental rights cannot be entered. If erroneously entered , then such an adjudication is void for want of due process.

Refs:

McMakin v. McMakin , 68 Mo. App.57

Larson v. Larson, 9 S.D. 1, 67 N.W. 842

Birsbane v. Brisbane, 34 Hun, 339

Mahoney v. Dwyer, 84 Hun, 348· 32 N.Y. Supp. 346

Following citations support the particular position that a defense cannot be denied to one failing to pay monetary sanction.

Foley v. Foley, 120 Cal.33, 65 Am. St. Rep. 147, 52 Pac. 122, holding that an answer cannot be stricken out. It is the violation of the Due Process clause of the Constitution of the United States:

Gorden v. Gorden, 141 III. 160 , 21 L.R.A. 387, 33 Am. St. Rep. 294, 30 N. E 446.

Johnson v. Superior Court, 63 Cal. 578 , holding that one cannot be denied due process for any reason.

Baily v. Baily, 69 iowa, 77.28 N.W. 443, holding that it would be against public policy to deny a defense for ones protection.

Canon v. Canon, 15 Ga. 405, & *McMakin v. McMakin*, 68 Mo. App.57

The united States Supreme Court thus affirmed the Opinion of the Court of Appeals of New York and stated that the District Court of Columbia lacked power to suppress or strike the answers of defendants.

The United States Supreme Court's opinion in *Hovey*

v. Elliot , 1767 U.S. 409, 42 L. ed 215, 17 Sup. Ct. Rep. 841 has become the case law. This has to be applied to the case at bar.

CONCLUSION

In order to protect the guaranteed fundamental rights of the citizens of the United States in general and the petitioners in particular, and in order to provide equal protection of law , Petitioners respectfully request the Honorable Supreme Court to Grant their Petition for Rehearing and summarily Vacate the Court of Appeals Opinion for want of due process.

Respectfully Submitted this 25th day of October, 2008

Suraiya Mateen

Roohi Fayaz

Reema Muhammed

APPENDIX A

FIRST DIVISION
ANDREWS,P.J.,
PHIPPS AND MIKELL, JJ.

Court of Appeals
of the State of Georgia (Seal) June 27, 2007

IN THE COURT OF ALLEALS OF GEORGIA

A05A1372. MATEEN et al. DICUS MK- 064

MIKELL, Judge,

In Mateen v. Dicus, the Supreme Court reversed Division 1 of our opinion in this case, holding that we erred in concluding that we lack jurisdiction to consider two enumerations of error because appellants Suraiya A. Mateen , Roohi Fatima Faiyaz and Reema Mohammedi

failed to include the relevant orders in their notice of appeal. Accordingly, our prior judgment as to Division 1 is vacated, and the judgment of the Supreme Court is made the judgment of this court. The Supreme Court remanded the case with direction that we consider appellants' remaining enumerations on the merits, We do so below.

1. Appellants complain that the trial court erred in adding a party, defendant Amtul Hameed, through publication. Appellants argue that service by publication was unauthorized because "Plaintiffs were very well aware of the party's address." This argument fails for three

reasons. First, Hameed is not a party to this appeal, and appellants have no standing to voice a vicarious objection to the sufficiency of service upon another party.

Second, appellants waived the argument by failing to assert it in the trial court. The record reveals that at a motions hearing, the court asked defendant Mateen, "are you here to argue defendant Hameed's motion for..... insufficiency of service of process? Mateen replied "No". The court stated "Hameed is not [here]. As far as you know, she's in India." Mateen replied "Yes Sir". It is well established that "one cannot complain of a judgment ,

order, or ruling that his own procedure or conduct procured or aided in causing. Appellants have waived any right to complain of the method of service upon Hameed.

Third, appellee Dicus complied with OCGA § 9-11-4(f)(1)(A) in obtaining the order for service by publication. He submitted as affidavit averring that he believed that Hameed resided in India but that he did not know where she could be found. Pursuant to the statute, the trial court may grant an order permitting service by publiction if, among other things, the affidavit is proper. In this case , appellants offered no evidence to contradict the

affidavit. Thus , the trial court did not err in ordering service by publication upon Hameed.

2. Appellant contend that the trial court erred in refusing to set aside the default judgment entered against them because Dicus's voluntary dismissal with prejudice of defendant John Walrath rendered the default judgment void. Walrath was the attorney who prepared the documents transferring the properties that were the subject of the fraudulent conveyance action. Appellants' contention that a voluntary dismissal with prejudice of an alleged joint tortfeasor renders void the judgment entered against the remaining defendants is not

supported by Georgia law. "A voluntary dismissal with prejudice constitutes a final disposition of the underlying action only as far as the parties involved in the voluntary dismisssal are concerned.... The effect of a voluntary dismissal does not extend to any party not named therein. Furthermore, pursuant to OCGA § 9-11-54(b), an order " which adjudicate fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties," In the case at bar, the dismissal with prejudice adjudicated the liabilities of only one party. It neither

terminated the action nor rendered the default judgment void. The Trial Court did not err in refusing to set aside the default judgment.

3. All pending motions filed by appellants are denied.

Judgment affirmed. Andrews, P.J. and Phipps,J., concur.

Footnotes:

1. 281 Ga.455(637 SE 2d 377) (2006)
2. Mateen v. Dicus, 275 Ga.App.742,743-744(1) (621 SE2d 487) (2005)

3. 281 Ga at 457. The remainder of our rulings were left undisturbed, and our prior decision is reversed only insofar as it is inconsistent with the Supreme Court's decision.

4. Phillips v. Phillips, 159 Ga. App. 676, 677 (2)(285 SE2d 52) (1981). Accord, Ueal v. AAA Partners in adoption, 269 Ga. App. 258, 260 (2)(603 SE2d 672)(2004)

5. (Citations and punctuations omitted.) Parlato v. City of Atlanta, 151. Ga. App. 235, 237 (259 SE2d 217)(1079).

6. Headquarter v, Merrill Lynch, Pierce, Fenner & Smith, 272 Ga. 209, 211-212(2) (528 SE2d 508) (200) (voluntary dismissal of employee does not bar vicarious liability of employer for employee's tortious acts unless dismissal is statutorily described as an adjudication on the merits).

7. See Tanaka v. Pecqueur, 28 Ga. App. 380, 383(5) (601 SE2d 830)(2004)

APPENDIX B Record Page Nos: 3737-3738

IN THE SUPERIOR COURT OF GWINNETT COUNTY

STATE OF GEORGIA

FRANK DICUS
Plaintiff

vs.

MOHAMMAD A, Faiyaz
SURAIYA A. MATEEN
ROOHI FATIMA FAIYAZ
REEMA MOHAMMEDI
JOHN G. WALRATH and
AMTUL HAMEED
Defendants

CIVIL ACTION
FILE NO. 98-A-2162-7

ORDER

Defendant Mateen filed her Motion to Set Aside Default Judgment on October 21, 2003. This Court has previously considered this issue, and this defendant presents no new evidence for the Court's consideration.

It is clear from the record that Defendant was

present at the February 7, 2001 hearing on Plaintiff's Motion for Sanctions, based on defendant's non -compliance with the Court's Order imposing sanctions in connection with compelling depositions, which resulted in the striking of Defendants Answer and entry of a Default Judgment against her on February 12, 2001. This Defendant has made the same allegation of fraud prior to and since then in various different fashions. As such, the Motion is HEREBY DENIED.

This case is on the Court's November 10, 2003 Jury Trial calendar for a trial on damages, and all interested parties should be present and prepared to proceed upon being called in by the Court.

SO ORDERED, THIS 5TH of November, 2003.

/Sd/

MELODIE SNELL CONNNER, Judge
Superior Court of Gwinnett County